

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RALPH I. MILLER,)
)
Plaintiff(s),) No. C02-2118 MJJ (BZ)
)
v.)
)
IBM CORP., et al.) **CERTIFICATION OF FACTS RE**
) **CONTEMPT**
)
Defendant(s).)
)
)
)
)
)

The undersigned hereby certifies the following facts to the Honorable Martin J. Jenkins in support of an entry of a judgment of criminal contempt against defendant International Business Machines Corporation (IBM) and/or its attorneys of record, Quinn Emanuel Urguhart Oliver & Hedges LLP.¹

¹ In a matter referred under 28 U.S.C. § 636(b), a magistrate judge has the power to certify to a district judge facts supporting the entry of a judgment of contempt for disobedience of a lawful order. 28 U.S.C. § 636(e)(6)(B). If an act constituting contempt occurs before a magistrate judge, he or she

shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of

1 1. In this action, plaintiff sued IBM for breach of
2 contract, misrepresentation and related claims. On August 2,
3 2005, Judge Jenkins referred the case to me to conduct a
4 settlement conference in April 2006.

5 2. On August 18, 2005, I entered an order scheduling the
6 settlement conference for Tuesday, April 25, 2006 at 9:00 a.m.
7 Among other things, the order required IBM to appear with its
8 lead trial counsel and to be represented "by the person or
9 persons not directly involved in the events which gave rise to
10 the litigation but with full authority to negotiate a
11 settlement. A person who needs to call another person not
12 present before accepting, rejecting or making any settlement
13 offer does not have full authority." Order, Page 2, Lines 4 -

14 9. The order further stated that "[p]ersonal attendance of a
15 party representative will rarely be excused by the Court, and
16 then only upon separate written application demonstrating
17 substantial hardship served on opposing counsel and lodged as
18 early as the bases for the hardship is known." Order, Page 2,
19

20 the facts so certified. The district judge shall
21 thereupon hear the evidence as to the act or
22 conduct complained of and, if it is such as to
23 warrant punishment, punish such person in the
24 same manner and to the same extent as for a
25 contempt committed before a district judge.

26 28 U.S.C. § 636(e)(6).

27 The magistrate judge's authority under section 636(e)
28 encompasses certification for criminal, as well as civil,
29 contempt. Taberer v. Armstrong World Indus., 954 F.2d 888 (3rd
30 Cir. 1992); Aldridge v. Young, 782 F. Supp. 1457 (D.Nev. 1991).
31 Criminal contempt is appropriate where, as here, the relief
32 requested is intended to punish past failures rather than to
33 coerce future compliance. Taberer, 954 F.2d at 897; Aldridge,
34 782 F. Supp. at 1458.

1 Lines 18 - 22.

2 3. On April 25, 2006, the settlement conference convened
3 at 9:00 a.m. Plaintiff was represented by Byron C. Thompson,
4 Esq. of Oakland and William F. Mueller, Esq. who had flown in
5 from New Jersey. Plaintiff flew in from North Carolina where
6 he was on business and arrived about an hour late because, I
7 was told, his flight had been delayed.

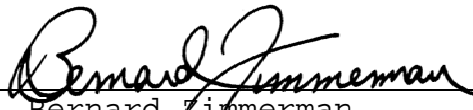
8 4. Defendant appeared by Terry L. Wit, Esq. an attorney
9 with Quinn Emmanuel. However, lead trial counsel, identified
10 by plaintiff as Loren Kieve, did not appear. Nor did a
11 representative from IBM appear. Instead, I was told that IBM's
12 representative, Associate General Counsel Alec Berman would be
13 appearing by phone. I had never been asked to excuse Mr.
14 Berman's personal appearance. Furthermore, it appeared from my
15 discussions with Mr. Berman about plaintiff's demand, that he
16 lacked full authority to settle the case as that term was
17 defined by my order. He merely stated IBM's position that it
18 was about to file a summary judgment motion and expected to
19 prevail.

20 5. When I questioned IBM about its apparent failures to
21 comply with my order, I was told that IBM expected, from what
22 was or was not said during a recent status conference before
23 Judge Jenkins, that this settlement conference would not occur.
24 Under these circumstances, I deem it appropriate to certify
25 this matter to Judge Jenkins rather than to exercise my
26 contempt authority under 28 U.S.C. § 636(e)(2).

27 Good cause appearing, **IT IS HEREBY ORDERED** that defendant
28 International Business Machines Corporation and its counsel

1 Loren Kieve of Quinn Emmanuel Urguhart Oliver & Hedges LLP
2 appear before Judge Jenkins on Tuesday, May 9, 2006 at 9:30 am
3 in Courtroom 11, 19th floor, Federal Building, 450 Golden Gate
4 Avenue, San Francisco, California 94102 and show cause why
5 either should not be adjudged in contempt of court for their
6 failure to participate in the April 25, 2006 settlement
7 conference as ordered.

8 DATED: April 26, 2006

9 
10 Bernard Zimmerman
United States Magistrate Judge

11
12 G:\BZALL\REFS\REFS.06\MILLER.CERT.OF.FACTS.CONTEMPT.wpd
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28